Term Extension Act, but rise in opposition to title II of the bill, relating to fairness in music licensing. Title II amounts to bad legislative decision-making for at least three reasons: (1) it is a shortsighted policy; (2) it is potentially an unconstitutional taking; and (3) it violates our multilateral treaty obligations which is likely to result in trade sanctions of property of songwriters.

First, by exempting most commercial establishments from paying copyright licensing fees for the public performance of music, the proposal will radically reduce the royalties that performing rights organizations (BMI, ASCAP and SESAC) will collect on behalf of songwriters. Admittedly, proponents of eroded protection—those that want a free ride off the backs of creators—are numerous and organized. But, this is no reason to enact legislation that will extinguish the flame of creativity and will chill the progress of science and the useful arts.

Second, the right to own private property free from arbitrary government interference is a basic tenet of American life. In fact, the right to own property is as ancient as humankind itself, with the enforcement of property rights being a part of legal systems worldwide. Under our constitutional scheme of government, property cannot be ''taken'' by government action without just compensation. Although debate swirls around the definition of the term ''taking'', common sense dictates that the term refers to any acts that diminish or deprive any legally protected right to use, possess, exclude others, or dispose of one's property, real or intellectual. Title II of the bill ''takes'' the property of songwriters and ''gives'' it to commercial establishments to use without compensation. In my opinion, it is taking without due process of law and just compensation and is therefore unconstitutional.

Third, the Secretary of Commerce has already advised Congress that fairness in music licensing reform legislation violates our international treaty obligations. His words have been seconded by a drumbeat of statements from the United States Trade Representative, the Register of Copyrights, and the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks that an overly broad exemption in section 110(5) of the Copyright Act would ''violate our obligations under the Berne Convention for the Protection of Literary and Artistic Works.'' I believe that Title II will result in a WTO finding that we have violated our multilateral treaty obligations.

For these reasons, I oppose Title II of the bill but because I support Title I, I will not ask for a recorded vote.

MISSISSIPPI SIOUX TRIBES JUDGMENT FUND DISTRIBUTION ACT OF 1998

SPEECH OF

HON. RICK HILL

OF MONTANA

IN THE HOUSE OF REPRESENTATIVES

Saturday, October 10, 1998

Mr. HILL. Mr. Speaker, I rise to support S. 391, the ''Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998.''

S. 391, sponsored by Senator DORGAN of North Dakota and cosponsored by his colleague from North Dakota and his colleagues from Montana and South Dakota, was originally introduced as a companion bill to H.R. 976. My legislation was brought up in the House under suspension of the rules and passed on September 8, 1997.

After receiving the referral of H.R. 976 the Senate Committee on Indian Affairs held a hearing on the measure on October 21, 1997 and favorably reported an amendment in the nature of a substitute on November 4, 1997. In order to address concerns raised by the Administration, the Committee on Indian Affairs held a legislative hearing on S. 391 on July 8, 1998. Only July 29, 1998 the committee favorably reported S. 391 with an amendment in the nature of a substitute. The Senate passed S. 391 on October 9, 1998.

The major difference between H.R. 976 as passed by the House and S. 391 as passed by the Senate concerns the amount of the judgment fund to be distributed to the three Sisseton and Wahpeton tribes. Under H.R. 976, these tribes would receive the interest on the undistributed funds and the lineal descendants would receive the principal originally allocated to them in the 1972 act. Under S. 391, the tribes will receive about 28.3 percent of the undistributed funds and the lineal descendants will receive about 71.6 percent. This disposition of the fund was resulted from extensive consultations by the Senate Committee on Indian Affairs both with the tribes and with the Administration. The Administration, in turn, consulted with representatives of the lineal descendants.

While in my opinion the tribes should receive the funds provided in the House passed measure the allocation funds in S. 391 represents a reasonable approach to accommodating the concerns and interests of the Administration, the tribes and lineal descendants. The cap S. 391 places on the amount of funds to be distributed to unaffiliated lineal descendants is particularly important. The United States has an important government-to-government relationship with these tribes and a trust responsibility to them that supports providing to the tribes the greatest percentage possible of the judgment fund that is compensation for the taking of lands owned by the tribes. Providing the greatest percentage possible will improve the desperate economies of these tribes while diminishing the amount of the fund that will be distributed per capita to unaffiliated lineal descendants to whom the United States does not owe the same trust obligation.

Apart from changing the tribal allocation, much of the remainder of S. 391 is the same as or similar to provision contained in H.R. 976. There are, however, certain new provisions that make more acceptable the reduction in the distribution to the tribes. One is a provision that tightens the methods used by the Secretary to verify the Sisseton and Wahpeton Mississippi Sioux Tribe lineal ancestry of new applicants who seek to participate as lineal descendants. The methods used by the Secretary with respect to those already identified as lineal descendants resulted in only 65 of those 1,988 individuals tracing ancestry to a member of the Sisseton and Wahpeton Mississippi Sioux Tribe. Since the judgment fund is compensation for lands taken from this aboriginal tribe it stands to reason and the 1972 act says as much explicitly, that eligibility to participate as a distributee must be based on lineal descendance from the aboriginal tribe. The only way to assure this is to have applicants identify a lineal ancestor who was a member of the tribe. S. 391 now more emphatically requires this. The Secretary, under S. 391, must use certain specified rolls to establish that an applicant has a lineal ancestor who was a member of the aboriginal tribe. However, it is not sufficient to simply identify an ancestor on one of the rolls referred to in S. 391. In addition it is necessary to ascertain that, that ancestor was a member of the aboriginal Sisseon and Wahpeton Mississippi Sioux Tribe. If the use of a particular roll does not permit the Secretary to determine that aboriginal tribe membership, then the Secretary must use other rolls, closer in time to the existence of the aboriginal tribe, to assure that an applicant has identified a ''specific Sisseton and Wahpeton Mississippi Sioux Tribe lineal ancestor.''

Section 8 is another important provision in S. 391. Subsections (a) and (f) of this section guarantee that if the lineal descendants bring suit challenging the constitutionality of the allocation to the tribes, the tribes will have the right to intervene in that suit to challenge the constitutionality of the allocation that S. 391 makes to the lineal descendants. Most importantly, the tribes will have the right to have their constitutional claims heard and determined on the merits. This was an important provision requested by the tribes as part of the negotiations that resulted in the reduction of the tribal allocation from that allowed under H.R. 976. The tribes' constitutional claims have never been determined on the merits despite the Federal court in Montana and United States Court of Appeals for the Ninth Circuit both stating that the tribes' claims merited litigation. These courts nevertheless was compelled to dismiss the claims as barred by a statute of limitations. A subsequent constitutional challenge by the tribes was dismissed on res judicata grounds by the Federal court in the District of Columbia. Section 8 of S. 391 will now allow these claims to be determined on the merits. In the context of S. 391, which also allows the lineal descendants to challenge the distribution made to the tribes, it is basic fairness to level the playing field by allowing the tribes to challenge the distribution to lineal descendants without the impediment of the types of defenses that in the past prevented the tribes from securing a merits disposition of their constitutional claims.

Subsection (f)(1) of S. 391 would preclude the tribes, once they receive a distribution under this act, from litigating a claim to challenge the distribution to lineal descendants arising under the 1972 act. However, if such a challenge commenced prior to the receipt of a distribution, that challenge is not impeded from proceeding. Also subsection (f)(2), as mentioned, protect the right of the tribes to secure a disposition on the merits of any claim they bring in intervention under subsection (a).

This bill has bipartisan support.

I urge my colleagues to support this measure.